Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, ROBERT L. KENNEDY, *Plffs. in Error,* *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK, *Defts. in Error.*	No. 302.
THE SAME, *ex rel.*, ABIEL A. LOW, *Plffs. in Error,* *vs.* THE SAME. *Defts. in Error.*	No. 303.
THE SAME, *ex rel.*, DENNING DUER, *Plffs. in Error.* *vs.* THE SAME. *Defts. in Error.*	No. 301.

These cases come before this Court on Writs of Error to the Court of Appeals of the State of New York.

The judgments of which a review is sought, affirmed the judgments of the Supreme Court of that State sustaining the assessments for taxation, by the defendants of certain shares held by the relators and by the other shareholders, in the capital stock of THE NATIONAL BANK OF COMMERCE IN NEW YORK.

The facts material to be considered on this argument are common to the three cases above entitled, which differ only in the particulars mentioned in the 9th Point below.

It is proposed to consider the case of the relator *Robert L. Kennedy*, (No. 302,) the decision of which will, it is presumed, be conclusive of the other two, (Nos. 301 and 303).

The Relator, ROBERT L. KENNEDY, (*Case No.* 302,) a resident of the City and County of New York, is a shareholder of the NATIONAL BANK OF COMMERCE IN NEW YORK.

He is also the VICE PRESIDENT of the same Bank, and, as such, represents the other shareholders thereof.

He is assessed for taxation for the taxes of 1866, on one hundred and seventy-five shares of the stock of said Bank, owned by him. (*Case, fol.* 12.)

The other shareholders of said Bank are also assessed for taxation on the shares held by them respectively. (*Case, fols.* 16–23.)

The capital stock of the Bank, (except so much as was invested in the real estate occupied by its banking house) was invested in stocks, bonds or other securities issued under acts of Congress and exempt by law from taxation by or under State authority. (*Case, fol.* 14.)

The Commissioners in making such assessments on the shares of said Bank made no allowance or deduction in respect to such investment. (*Case, fol.* 21.)

Insurance Companies created under the laws of New York, transacting business in the City of New York, were respectively assessed for the taxes of 1866, on the residue only of their capital and surplus profits liable to taxation after making such deductions as are required by the laws of the State, *and after deducting also therefrom* the amount of bonds and other securities of the United States declared by Congress to be exempt from taxation by or under State or municipal authority. (*Case, fol.* 21.)

The shareholders in such Insurance Companies were not assessed in respect of their shares—and such shares could not be included in the valuation of their personal property. see State Stats. cited under 3d & 4th Points post.

Individual citizens were assessed only to the amount of their personal estate after deducting such amounts as were held by them in United States securities. (*Case, fol.* 21.)

The Commissioners claim that the assessments so made by them for the taxation of shares of said Bank, were authorized by the provisions of *Chapters* 698 *and* 761 of the Laws of New York for the year 1866. (*Case, fol.* 53.)

Chapter 698, (passed April 20, 1866,) vests the Commissioners with authority to make assessments in the City of New York authorized by law.

Chapter 761, (passed April 23, 1866,) is as follows:

AN ACT authorizing the taxation of stockholders of Banks, and the surplus funds of Savings Banks.

Passed April 23, 1866.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder, in the assessment of taxes at the place, town or ward where such Bank or Banking association is located, and not elsewhere, whether the said stockholder reside in said place, town or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held to the whole amount of the capital stock of said bank or banking association. And provided, further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed.

§ 2. Every individual banker doing banking business under the laws of this State, is hereby required to declare upon oath before the

assessor the amount of capital invested in such banking business and each one hundred dollars of such capital for the purpose of this act, and for the purpose of taxation shall be held and regarded as one individual share in such banking business, and such shares are hereby declared to be personal property. If such banker have partners he shall declare upon oath before the assessor the number of shares held by each of them in such banking business, ascertained as above provided, and the shares so held by any partner shall be included in the valuation of his taxable property in the assessment of all taxes levied in the town, school district or ward where such individual banker is located, and not elsewhere; and such individual banker shall pay the same and make the amount so paid a charge in his accounts with such partners; and if such individual banker have no partners he shall be held to be sole owner of all the shares in such business of banking, and the same shall be included in the valuation of his personal property in the assessment of all taxes levied in the town, school district or ward where his bank is located, and not elsewhere.

§ 3. There shall be kept at all times in the office where the business of such bank or banking association, organized under the authority of this State or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each; and such list shall be subject to the inspection of the officers authorized to assess taxes during the business hours of each day in which business may be legally transacted.

§ 4. Sections ten and eleven of chapter ninety-seven of the session laws of eighteen hundred and sixty-five are hereby repealed.

§ 5. When the owner of stock in any bank or banking association organized under the laws of this State, or of the United States, shall not reside in the same place where the bank or banking association is located, the collector and county treasurer shall, respectively have the same powers as to collecting the tax to be assessed by this act, as they have by statute, when the person assessed has removed from the, town, ward or county in which the assessment was made; and the county treasurer, receiver of taxes, or other officer authorized to receive said tax from the collector, may all or either of them have an action to collect the tax from the avails of the sale of his shares of stock, and the tax on the share or shares of said stock shall be and remain a lien thereon till the payment of said tax.

§ 6. For the purpose of collecting such taxes, and in addition to any other law of this State, not in conflict with the constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or banking association, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officer that such taxes have been paid.

§ 7. The privileges and franchises granted by the legislature of this State, to savings banks or institutions for savings, are hereby declared to be personal property and liable to taxation as such in the town or ward where they are located, to an amount not exceeding the gross sum of their surplus earned, and in the possession of said banks or institutions, and the officers of such institutions or banks may be examined on oath by assessors, as to the amount of such surplus; and the property of such banks and institutions shall

be liable to seizure and sale for the payment of all taxes assessed upon them for said privileges and franchises.

§ 8. This act shall take effect immediately.

The clause of the Act of Congress under which the right to tax the shares of National Banking Associations, is claimed is in these words:

"* * * * * *Provided*, That nothing in this Act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being *included in the valuation* of the personal property of such person or corporation *in the assessment* of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is *assessed* upon other moneyed capital in the hands of individual citizens of such State:

"*Provided, further*, That the *tax* so *imposed* under the laws of any State upon the shares of any of the associations authorized by this Act *shall not exceed the rate imposed* upon the shares in any of the banks organized under authority of the State where such association is located:

"*Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, County, or Municipal taxes to the same extent, according to its value, as other real estate is taxed."

(*Sec.* 41. *Act of June 3d*, 1864. 13 *Stats, p.* 112.)

POINTS.

I.—The 41st section of the Act of Congress of June 3d, 1864, enabling the States to include the shares of National Banks held by any person or body corporate "in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such Bank is

located and not elsewhere"—is qualified by the distinct condition or restriction that such valuation of shares shall not be assessed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

No tax, therefore, can be imposed by a State upon such shares if such restriction or condition contained in the Act of Congress is not complied with.

* *Van Allen vs. The Assessors*, 3 *Wallace R.* 573.

II.—The two *provisos* of the 41st section of the Act of June 3, 1864, respectively refer to entirely different subjects.

1.—The first relates to the *valuation* at which the shares shall be assessed—and provides that it shall not exceed the rate of valuation at which other moneyed capital in the hands of individuals shall be assessed.

2.—The second proviso refers to the rate at which *taxes* shall be imposed on such valuation, after such assessment has been made, and provides that such taxes shall not exceed in rate, or per centage, that imposed on shares in State Banks.

The question, in this case, is not as to any rate, or per centage, at which taxes have been imposed, but as to the rate or value at which the shares have been assessed.

III.—The assessment of the shares held by the Relator in the *Bank of Commerce* was invalid, because they were assessed at a greater rate than "other moneyed capital, in the hands of individual citizens" of New York:

They were assessed at a greater rate than was assessed on the shares in Insurance Companies.

They were assessed at a greater rate than was assessed on the capital of Insurance Companies;

1.—*Insurance Companies* incorporated under the laws of New York are moneyed corporations.

1 *Rev. Stats. of N. Y.*, 598, *sec.* 51. (*Origina paging and section.*)

2.—Such companies by the Laws of New York are subject to taxation on their capital.

1 *Rev. Stats.* 414, *sec.* 1. (*Original paging and section.*

3.—But they were assessed, and could legally be assessed, only upon the balance, or residue of their capital and surplus profits, after deducting therefrom the amount of bonds and other securities of the United States held by them.

Case fol. 21.
Bank of Commerce v. Tax Commissioners.
2 *Black.*, 620.
Bank Tax case, 2 *Wallace*, 206.

4.—Inasmuch, therefore, as in estimating the value of the shares of the Relator in the *Bank of Commerce* no allowance or deduction was made for or on account of the investment of its capital in the stocks, bonds and securities of the United States,—(*Case, fol.* 21)—and inasmuch as in the assessment of such Insurance Companies for taxation, deduction was made of the amount of the capital invested in such stocks, bonds and securities (*Case fol.* 21) it follows that the tax imposed on such Insurance capital is "not an equivalent for the tax on the shares" of the Relator in the Bank of Commerce—

Van Allen v. The Assessors, 3 *Wallace R.* 581

and consequently that the assessment of the Relator's Bank shares was, in fact, at a greater rate than on the capital of such Insursance Companies, or of the stockholders thereof.

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IV.—Should it be contended that an assessment on the *capital* of Insurance Companies is not an assessment on moneyed capital in the hands of individual citizens, (on the ground that no part of the capital of the corporation is the capital of the stockholders), then we claim that the assessment of the shares of the Relator in the Bank stock was not in conformity to the restriction impcsed by the Act of Congress inasmuch as the same were assessed at a greater rate than was assessed on the *shares of Insurance Companies*, which shares are "other moneyed capital in the hands of individual citizens."

Such Insurance shares ——————— could not be included in the valuations of the personal property of the holders in the assessment for taxation.

By the law of New York the holder or owner of stock in any icorporated company liable to taxation on its capital is not taxable as an individual for such stock.

1 *Rev. Stats.* 388, *sec.* 7.

As Insurance companies are subject to taxation on their capital, (1 *Rev. Stats.* 414, *sec.* 1), the owners of stock in such companies are consequently exempt from taxation thereon. The stock so held by them ——therefore———. ——— could not under the laws of New York be included, in the valuation of their personal property in the assessment of taxes imposed by or under State authority.

The result is that the shares of the relator in the *National Bank of Commerce* have been assessed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens.

It is immaterial whether reference be made to the tax assessed upon the *capital* of Insurance Companies or to that assessed upon the owners of *shares* of stock in such companies, for in either case the assessment of the shares of the *Bank of Commerce* held by the Relator has not been within the condition or restriction imposed by the act of Congress, but has been "at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of the State."

V.—It is no answer to say that the Bank shares have not been assessed for valuation at a greater rate than Insurance shares, because the latter are not assessed at all, and are not subject under the State laws to taxation.

Such omission to assess and tax Insurance shares is subversive of the principle of the first proviso. Its direct result is to produce the prohibited discrimination.

VI.—It is respectfully submitted that the reasons above assigned for the reversal of the judgment of the State Court, are fully sanctioned by the unanimous opinion of this Court in

Van Allen v. The Assessors, 3 *Wallace*, 573.

In that case the judgment was reversed, because of a non-compliance with the *second* proviso of the 41st section relating to the *tax*.

In the present case the defect is a parallel non-compliance with the *first* proviso relating to the *assessment*.

In that case MR. JUSTICE NELSON, referring to the non-conformity of the "enabling Act" of New York to the limitations of the 41st section of the Act of Congress, says: * * * 'The defect is this: one of the limitations in the Act of Congress is,

'*That the tax so imposed under the laws of any State upon the shares of the association authorized by this Act, shall not exceed the rate imposed upon the shares of any of the Banks organized under the authority of the State where such association is located.*'

"The enabling Act of the State contains no such "limitation. The Banks of the State are taxed "upon their capital, and although the Act provides "that the tax on the shares of the National "Banks shall not exceed the par value, yet, in-"asmuch as the capital of the State Banks may "consist of the bonds of the United States, "which are exempt from taxation, it is easy to "see that this taxation is not an equivalent for "a tax on the shares of the stockholders."

CHIEF JUSTICE CHASE, on the same subject says: "the Court is unanimous in the opinion "that the judgment of the Court of Appeals of "New York must be reversed because the shares "of the United States Banking Associations are "not taxed by the law of New York according "to one branch of the rule prescribed by the Act "of Congress; that is to say, as the shares of "the Banks of the State are taxed."

In that case the shares of the National Banks were specifically taxed. The *capital*, (and not the shares,) of the State Banks was taxed. Thus the owners of the State Banks escaped all taxation on their shares, and escaped even indirect taxation on so much of their property or interest in the State Banks as was invested in Government Securities, while the owners of the National Banks had no diminution of the taxes on their shares, by reason of any such investments of capital of National Banks. Thus the tax paid by the two classes of shareholders was unequal.

The proceedings of the defendants in this case, and the State Laws, under which they acted, are in like manner defective as to the *assessment for valuation.*

The assessment of the relators bank shares has been made "at a greater rate than is assessed on other monied capital, &c.," to wit: on shares in Insurance Companies. The taxation of such companies was, (like the taxation of state banks,) on their *capitals.* Shareholders of

Insurance Companies (like shareholders of state banks,) were not taxed on their *shares.*

For the like reason that the *taxes* were held by the Court, (in *Van Allen vs the Assessors,*) not to be within the second proviso—it seems to be clear, therefore that the *assessment* for *valuation* in the present case is not within the first proviso.

The Statutes of the State make, (as has been shown,) a discrimination between the *shares* of banks and the shares of Insurance Companies, ("other monied capital,") in the *assessment* for valuation, parallel to the discrimination which the previous acts made in reference to *taxation.*

VII.—The whole capital of the Bank being invested in United States securities, exempted by law from taxation by State or municipal authority, it was not competent for the commissioners under any such authority to assess such shares of stock for taxation. They were not subject to such taxation.

McCulloch vs. U. S. Bank, 4 *Wheat,* 316.
Osborn vs. U. S. Bank, 9 *Wheat,* 738.
Weston vs. City of Charleston, 2 *Peters,* 449.
Bank of America vs. Tax Commissioners, &c., 2 *Black,* 630.
Act of Congress, 25 *Feb.,* 1862.

VIII.—It was not competent for the state to tax such shares, for the only authority claimed is under the act of Congress of June 3d, 1864. Congress alone had authority to impose such taxation, and could not delegate that authority to State Legislatures.

Bartow vs. Himrod, 8 *N. Y.*, 483.
Corning vs. Green, 23 *Barb.*, 33.
Thorne vs. Cramer,, 15 *Barb.*, 112.
Bradley vs. Baxter, 15 *Barb.*, 122.

IX.—The relators in the cases, Nos. 301 and 303, (at the head of this brief)

THE PEOPLE, ex rel., LOW, vs. THE COMMISSIONERS, AND THE PEOPLE, ex rel., DUER, vs. THE SAME.

are, like the relator *R. L. Kennedy*, in the case which has been discussed, shareholders in the *Bank of Commerce.*

The only points in which these cases differ from his are that the relator in *No.* 301, is a non-resident of the City of New York, and resides in Kings County; that the relator in *No.* 303, is a resident of the State New Jersey—(which facts were deemed material as to the regularity of the proceedings of the Commissioners under the State Law);—and the relator R. L. Kennedy, in *No.* 302, as Vice President of the Bank, represents the case of the other shareholders as well as his own.

X.—The Judgment of the Court of Appeals of New York in each of the above entitled cases should be reversed with costs.

BENJ. D. SILLIMAN,
Of Counsel for Relators.

On the 15 May Warrant for Collector and 2 Inspectors of Early Settlers drawn

Mica J Parker's Brief

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE COMMISSIONERS OF TAXES OF THE CITY AND COUNTY OF NEW YORK, Defendants in Error,

adsm.

THE PEOPLE, ON THE RELATION OF ROBERT L. KENNEDY, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. ABIEL A. LOW, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. DENNING DUER, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. HENRY J. BEERS, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. JOHN BODINE, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. RALPH MEAD, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. WILLIAM K. KITCHEN, Plaintiffs in Error.

THE SAME, Defendants in Error,

adsm.

THE PEOPLE, &c., ex. rel. JOHN E. WILLIAMS, Plaintiffs in Error.

THE SAME, Defendants in Error,
adsm.
THE PEOPLE, &c., ex. rel. DAVID DOWS, Plaintiffs in Error.

THE SAME, Defendants in Error,
adsm.
THE PEOPLE, &c., ex. rel. FRANCIS A. PALMER, Plaintiffs in Error.

THE SAME, Defendants in Error,
adsm.
THE PEOPLE, ex. rel. PETER M. BRYSON, Plaintiffs in Error.

These cases came up on writs of error from the Court of Appeals of the State of New York.

Proceedings were commenced in the Supreme Court of New York, against the commissioners of taxes of the city of New York, to test the legality of certain taxes imposed upon the several relators. Judgments were given for the defendants and on appeal, these judgments were affirmed by the Court of Appeals.

The principal question involved is the constitutional right to tax the shares of stockholders in National Banks.

That and the other questions presented are sufficiently stated in the following points.

Points of Defendants in Error.

I.

All the questions involved in the discussion of these cases upon the merits have been heretofore considered and decided by this court against the positions maintained by the plaintiffs in error.

(1). When the question of the right of the State authorities to tax shareholders in National Banks, was before this court in February last, in the case of Van Allen vs. the Assessors, it was held that the right existed

and that the tax would have been legal, except for a single defect in the enabling act passed by the Legislature of New York in 1865 which consisted in an omission to re-enact a provision of the act of Congress which required, that "the tax so imposed under the laws of any State upon the shares of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located," and it was then said by the court that that defect "may be readily remedied by the State Legislature.

Van Allen vs. the Assessors, 3 Wallace, 573, 581.
Ch., 106 of Act of Congress of 1864, § 41.

(2). That defect was accordingly remedied by the act of the Legislature of New York passed April 23, 1866, by which both State and National Banks were put on precisely the same footing as to taxation.

Section 1, of said act, is as follows: "No tax shall 'hereafter be assessed upon the capital of any bank 'or banking association organized under the authority 'of this State, or of the United States, but the stock-'holders in such banks and banking associations shall 'be assessed and taxed on the value of their shares of 'stock therein; said shares shall be included in the 'valuation of the personal property of such stockhold-'ers, in the assessment of taxes at the place, town or 'ward where such bank or banking association is lo-'cated and not elsewhere, whether the said stockhold-'er reside in said place, town, or ward or not, but not 'at a greater rate than is assessed upon other moneyed 'capital in the hands of individuals in said state, &c., &c.

Sess. Laws of N. Y., for 1866, 2 vol. 1647.

(3). That it was then intended by this court to make

a final disposition of the question whether the shares of National Banks were liable to municipal taxation is declared by the court itself in the following language: "The court are of opinion that this power is possessed 'by the State and that it is due to the several cases, 'which have been so fully and satisfactorily argued 'before us at this term, as well as to the public interest 'involved, that the question should be finally disposed 'of." And the court then proceeded to state the grounds and reasons which they said "had led to 'their judgment in the case."

The very full and able discussion of all the questions involved, as well in the minority as in the majority opinions of the court, shows that every point was fully considered by all the judges with a view to a decision of all the questions now attempted to be raised again.

It was held, in that case:

1. That it is not a tax upon the U. S. bonds, but upon the benefits the shareholder would derive from the new use of them under the privilege conferred upon the associations by the act of Congress.

2. That a tax on the shares is not a tax on the capital of the bank.

3. That Congress has the power to permit the States to levy the tax, and has so legislated as to leave the shares of the stockholder subject to State taxation without any deduction for United States bonds held by the association.

4. That "the State tax under this act of Congress involves no question as to the plighted faith of the government."

(4). It is true, there was another question involved in the case of Van Allen vs. the Assessors, viz.: whether the enabling act of the Legislature of New York had complied with the requirement of the act of Congress in imposing the same rate of taxation upon State as upon National banks. But that makes the decision none the less authoritative on the other question. Both the questions were equally presented in the case. The constitutional power to tax, and the question whether the tax was properly levied were both raised, discussed and decided. A decision of either against the defendants in error would entitle the plaintiffs in error to a reversal of the judgment. And it makes no difference that the decision of one, standing alone, requires the affirmance of the judgment, and the other called for a reversal, though the judgment was in fact reversed. A decision becomes authority, when it appears the question was really involved and was fully considered and decided by the court.

But if the question upon the merits is again open for discussion, then we say,

II.

The ground upon which it was held that a State had not power to tax the late Bank of the United States, was that "the State governments have no right to tax 'any of the constitutional means employed by the 'government of the union to exercise its constitutional 'powers," and had "no power by taxation or other-'wise, to retard, impede, burthen, or in any manner 'control the operations of the constitutional laws

'enacted by Congress to carry into effect the power 'vested in the general government."

McCulloch vs. The State of Maryland, 4 Wheaton, 315.

(1). We claim that there was much more reason for holding that the late Bank of the United States was an instrument of the government created for the purpose of carrying on its constitutional operations, than there is for saying that the National Banks of the present day are such instruments.

The government owned seven millions of the thirty-five millions of capital of the former Bank of the United States, and appointed five of its twenty-five directors. To this extent it was machinery managed by the government itself.

It contributed one million and a half of its funds to the public resources. It was made subject to the visitation of the Secretary of the Treasury, and was bound to obey his orders, for transferring the public funds, without charge for exchange, to all parts of the United States and the Federal Territories.

None of these features belong to the banks now called National Banks. It is true they are used as depositories of the public funds, and so were the State Banks for many years; but it was never claimed that, for that reason, they were such instruments of the government as to be exempted from taxation.

It was said of the late Bank of the U. S., by Ch. J. Marshall, in Osborn vs. The Bank of the U. S., 9 Wheat., 769: "The casual circumstance of its being 'employed by the government in the transaction of 'its fiscal affairs, would no more exempt its private 'business from the operation of that power (the tax-'ing power of the State), than it would exempt the 'private business of any individual."

The decisions in 4 Wheat. and 9 Wheat. were put on the express ground (9 Wheat., 770), that the bank was not "a private corporation, whose principal 'object was individual trade and individual profit, 'but a public corporation, created for public and 'national purposes," and was "necessary and proper 'for carrying into effect the powers vested in the 'government," and it cannot be justly claimed that that decision is applicable to the present National Banks.

As well might it be claimed that personal property, invested in a line of stages, or in the stock of railroads, employed in carrying the U. S. mails, or in an express company, engaged in carrying parcels for the government, or in a telegraph company, employed in transmitting messages for the government, is exempt from taxation.

(2). But conceding, even, that the banks called National Banks, are to be governed by the same rule as that applied to the late Bank of the United States, the conclusive answer to the exemption claimed is, that the banks themselves are not taxed, nor is any question of right to tax such banks involved in this case.

It was decided in McCulloch vs. the State of Maryland, that the late Bank of the United States was not liable to State taxation — but it was also decided in that case, that the shareholders were liable to such taxation.

Though taxing the bank itself, which was the active, living instrument of the government, was, for that reason, held to be unconstitutional, it was held that the interests of the *shareholders* were not within either the prohibition or the reason for it; for it was held in that case, that though the Legislature of

Maryland had no power to impose a tax on the Bank of the United States, and that such tax was unconstitutional and void, yet that the State might tax the real estate owned by the Bank, *and the shares of stock which the citizens of Maryland held in the institution.*

4 Wheaton, 491.

Mr. Pinckney, the leading counsel for the Bank, in his closing argument in that case, admitted "that the 'stock in the Bank belonging to the citizens of 'Maryland, still continued liable to State taxation, as 'a portion of the individual property in common with 'all the other property of the State. *The establishment 'of the Bank, so far from withdrawing anything from State 'taxation, brings something into it which the State may tax.*"

In that case, it became necessary to define and declare the precise limit of the taxing power, and the Chief Justice concluded a full examination, of the question, as follows:

"This opinion does not deprive the States of any 'resources which they originally possessed. It does 'not extend to a tax, paid by the real property of the 'bank, in common with the other real property within 'the State, *nor to a tax imposed upon the interest which 'the citizens of Maryland may hold in this institution, in 'common with other property of the same description 'throughout the State.* But this is a tax on the operations of the bank; a tax on the operations of an 'instrument employed by the government of the 'union, to carry its powers into execution. Such a 'tax must be unconstitutional."

The reasoning of this case is repeated and the decision reaffirmed in Osborn vs. the Bank of the U. S., 9 Wheat., 738, 769, and in the License cases, 5 Howard, 576.

The enforcement of a tax on the bank itself, being

upon the operations of the bank, might be the means of suspending its operations and depriving the government of the use of its instruments. But a tax on the shareholder could only be enforced against him personally, and could to no degree, interfere with the operations of the bank. A sale under the tax of his shares of stock, would only substitute a new stockholder in his place, and in no respect delay the business operations of the bank.

It has been urged by the counsel for the banks, that taxing the stockholders tends to lessen the value of the stock, and thus affects the usefulness of the instrumentality— that the stock would be worth more, if it were not taxable.

The same argument may be made with regard to the notes of National Banks held by the citizen. A citizen holds $10,000 in such bank notes. It will not be questioned but that he is liable to be taxed on account of such personal property. Yet it is certain that the notes would be of higher value, and the instrumentality more independent, if the holder of such bank notes were exempt from taxation on account of them.

It is plain that the only safe rule is that laid down in 4 Wheaton, that it is only a tax imposed directly on the instrumentality itself, that is violative of the constitution.

We claim that the Supreme Court of the United States intended carefully to discriminate between the interests of the individual shareholders and the corporate body itself. The court sought and established the dividing line and marked it by metes and bounds, the shareholder being on one side and the corporation on the other.

(For a more full discussion of the reasons for this

discrimination between taxing the bank and taxing the shareholders, see the next Point).

(3). It has been expressly decided that stock in the Bank of the U. S. held by individuals may constitutionally be taxed by a State.

Bulow v. The City of Charleston, 1 Nott & McCord, 527.
State v. Collector, 2 Bailey, 654.

These decisions were not made in a spirit of hostility to the Federal government.

The case in 1 Nott & McCord was decided in January, 1819, about one month before the argument in this court of the case of McCulloch vs. the State of Maryland.

And the case in 2 Bailey was decided in 1831, and, in the opinion of the court, the distinction made by Ch. J. Marshall as to the right to tax the interests of shareholders was relied upon as authority for the judgment then given by the Court of Appeal of South Carolina.

It is believed no different rule of law on this point has been claimed either in the State or United States courts.

III.

The ground upon which U. S. bonds have been declared exempt from State taxation is, that it is a tax on the contract between the government and the individual—"a tax on the power to borrow money on 'the credit of the United States, and consequently 'repugnant to the constitution."

Weston vs. The City of Charleston, 2 Peters, 465, 469.
Bank of Commerce, vs. The City of New York, 2 Black, 620.
Bank Tax Case, 2 Wallace, 200.

But the tax in this case is neither a tax on the bonds, nor on the bank owning such bonds.

(1). The bank is a corporation — an artificial person, and has an independent legal existence, and is the legal owner of the bonds. The bank alone can buy and sell, and control the corporate property, and the bank alone can be taxed for any taxable property it may own.

The stockholder is, in no sense, the legal owner of the bonds. He did not buy them, and cannot sell them. He can exercise no control whatever over them. He has no right to their custody, or even to see them. They cannot be sold at law, or reached by proceeding in equity to satisfy a debt of the stockholder. They are only liable for a debt of the corporation. The holder of the bills and not the shareholder, has the first claim on the assets of the bank, and is the better entitled to be called the owner.

(2). The shares of stock belonging to the shareholder are only *choses in action*, in regard to which his only claim is on the corporation, and not on the United States. Those shares represent a business enterprise — profit or loss by banking — surplus profits — an interest to, perhaps, several times the amount of the capital in discounted paper, or credits at other banks, and an interest in or liability for a circulation of bank notes. The shares of stock represent the investment — the *speculation*, whether it be a good one or a bad one; and it is almost invariably the former, the profits being generally very large.

(3). The bank owns the U. S. bonds. The shareholder in the bank owns merely the right to a share of the profits made in *banking* on such bonds.

A bank share, costing originally but $100, may have a market value of much more than that sum, not because the capital of the bank has been increased, but because, by reason of the skillful management of the bank and the great privileges conferred with its franchise, large dividends are made.

The shareholder paid his money to the bank, not for U. S. bonds, but for a chance in the speculation, and he took a certificate accordingly. The bank may own the U. S. bonds one day, and sell them the next, but the stockholder's rights and interests remain the same. They are in no way affected by the question whether the bank does or does not own any U. S. bonds.

A share of corporate stock is defined to be "a right 'to partake, according to the amount of the party's 'subscription, of the surplus profits obtained from the 'use and disposal of the capital stock of the company to 'those purposes for which the company is constituted."

Ang. & Ames on Corp, § 557.
Wildman vs. Wildman, 9 Vesey, 177.
Kirby vs. Potter, 4 Vesey, 751.
Bank of Waltham, vs. Waltham, 10 Metc., 339.

That the shareholder is not, in a legal sense, the owner of the corporate property, is apparent from the consideration that though the corporate property consist of real estate, the shares are still personal property.

2 Kent's Com., 341, note.

It is said "the land, buildings, &c., of companies 'are the mere instruments whereby the company is 'made to produce a profit, *and moreover, belong exclusively 'to the corporate body, which is altogether a separate person from the individual members.*"

Ang. & Ames on Corp., § 557.
Bradley vs. Holdsworth, 3 Mees. & Welsb., 334.

The same view as to the ownership of shareholders in the property of a corporation has been recently taken by the Queen's Bench in England, in the Queen v. Arnoud, 9 Adolphus & Ellis, N. S., 806.

The British acts of Parliament forbid the registry of a ship as a British vessel unless it is wholly owned by British subjects. If a part owner is not a subject, it cannot be registered.

A mandamus was sued out to compel the registry of a vessel owned by a British corporation, some of the shares of which were owned by foreigners. Judgment was given for the plaintiff, sustaining the right of registry. Lord Denman said:

"It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

(4). The contract to be protected by the constitution is between the government and the corporation, not between the government and the shareholder.

There is a reason for not taxing a bond held as an investment. There the holder is restricted in his profit to the interest agreed to be paid. To tax the holder would lessen a fixed compensation. But when the privilege and profit of banking on the bond are given, the reason for exemption no longer exists. The tax is on the franchise and not on the bond, and such was the view taken on this subject in Congress when the act under which these banks were authorized was passed, containing the express authority to tax the shareholders.

(5). In the case in 2 Black, it seems to be conceded

that the State may tax the nominal capital of a bank without regard to value or valuation, whether it held U. S. stocks or not — for, in that case, it would tax the franchise and not stock; and the distinction here is still wider, between the shares of the stock and the bonds held by the corporation, than it would be between the nominal capital of a State Bank and the U. S. bonds in which it was invested.

IV.

Thus far we have examined the right to tax these banks, as it exists, independent of any action of Congress. But the act of Congress, chap. 106, first Session of the 38th Congress, sec. 41, passed June 3d, 1864, under which National Banks are organized, expressly permits the stockholders of such banks to be taxed on *all* their shares, and it gives this permission in the same act by which it provides for investing the capital, or a portion of it, in U. S. bonds.

And that it was not deemed to be a taxing of the bonds, is evident from the fact that no deduction is provided for, or required to be made for the capital so invested.

It is conceded that Congress has no power to regulate the machinery of State taxation. And it is conceded that Congress can confer no additional powers on State governments.

But has not Congress the power to surrender a claim as regards property belonging to the United States? May it not waive a right?

We do not think Congress has done so in this case, for we have already shown that the right to tax bank shares exists independent of any action of Congress

But would not Congress have the right to say the state might tax certain bonds which it then proposed to issue?

The immunity from taxation is adjudged on the sole ground, and only so far as such exemption is necessary for the national credit or for the public interest. Congress is the sole guardian of that credit and of such interests; and if Congress, in its discretion, decides that the public interests require that such exemption should be waived, surely the waiver would be valid and effectual.

Although, therefore, Congress, by its enactment, can add nothing to the force of the constitutional prohibition, yet, inasmuch as that constitutional prohibition, resting only on implication, extends no further than the protection of the public interests may require, and as Congress is the sole judge of the extent to which such protection is necessary, Congress may, in its discretion, waive the exemption.

The holder of a U. S. bond cannot complain of such an exemption when the same act of Congress conferred on him a franchise, and the means of adding largely to his profits by using the bonds for banking, and when the exemption from taxation was only to be waived in case the holder should elect to avail himself of the additional profits afforded him by such use of the bonds. In permitting the States to tax the shareholders, Congress recognizes the right of the State in which the bank is located, and whose laws and officers protect the persons and property of the stockholders, to call for a contribution of a joint portion of the expense; and Congress also, by the act in question, initiates a policy which, by equalizing the burdens of taxation, satisfies the public sense of justice, and thus strengthens the public credit.

V.

There is no breach of faith by Congress in subjecting the shares of stock to taxation, although the whole amount of the capital of the bank was required to be, and in fact was, invested in United States securities, which when purchased by the bank, were exempt from State taxation.

(1). The bonds were not, before they were authorized to be made the basis of banking, exempt from such burdens as Congress might see fit to impose upon their owners. They were merely exempt from State taxation for the benefit of the Federal government.

(2). When Congress authorized these bonds to be made the basis of banking and authorized the owners to issue notes to circulate as money upon a pledge of them, they granted to the owners a privilege at their option, and had a perfect right to subject them, when used for this purpose to State taxation.

The present provision in § 41, was reported by the Senate Finance Committee in the place of a provision which contained this clause: "Provided, that no State tax shall be imposed on any part of the capital stock of such associations invested in the bonds of the United States, deposited as security for its circulation." On the amendment reported by the committee, there was a long discussion on the point, whether any portion of the shares should be exempted from State taxation, by reason of any United States bonds the bank might hold, and on every vote the expression was very strong against the exemption.

Senator FESSENDEN and Judge COLLAMER, both forcibly argued that the shares should be made taxa-

ble, without reference to the amount of United States bonds the bank held, and more than two-thirds of the Senate agreed with them. FESSENDEN said (*Cong. Globe, p.* 1872), "We do not break faith at all; because when we proposed to exempt certain bonds, issued by the government and purchased by individuals, from State taxation, it was simply as property so much invested, not as property used for the purpose of banking, giving to it another distinctive character. We say simply in reference to this matter: 'If you choose, instead of specie or any other property that you have, which is to be deposited as security for your bills, you may deposit and we will accept bonds of the United States.' That is a privilege we give them. Then we say, when there is an organization of a bank in this way, and the persons who put their capital into it take it out of their other business, or their other means, subject as that is to State taxation and put it in this particular bank, that that capital shall remain subject to State taxation precisely in the same way that other property is, or that it was before they invested it in that particular mode. This is all we say with reference to it. The question as to taxing these banks out of existence which has been talked about, has not the slightest application in the world; because we limit the power of State taxation. They must tax this property thus invested precisely as they tax other personal property, and to no greater extent. The power of taxation is limited in the same way."

Judge COLLAMER said (p. 1890), "I insist that a tax upon the shareholders in a bank is no tax upon the stock of that bank." * * * "But to say that a tax upon the shares of a bank is a tax on the bonds that constitute the capital of that bank is utterly fallacious." * * * "The truth is that when we gave out these bonds to the people, all

the assurance given to them was that they should not be taxed by the States. A man may have them and hold them, and I grant that they are property in one respect. For instance: they are the means of making a pledge; they can be used as collateral security for borrowing money. They are valuable in other ways, besides the interest received from the government. But when you undertake to make a law by which you transfer them into banking capital, and enable the man who holds them, not to borrow money upon them but to lend money upon them; that is entirely a different affair; that is enitrely a new privilege, and one to which, when granted, the government may annex such conditions as it thinks proper."

At page 2,199, Judge Collamer further says: "But 'when we undertake to make them (United States 'bonds) into bank capital, and authorize the associa-'tions to issue currency upon the strength of them, 'and bank upon them, that is entirely a new privilege. 'That is the privilege of loaning money on them, not 'borrowing money on them; and for that new privi-'lege of using these bonds as a banking capital, the 'government has a right, of course, to annex to the 'grant of that new privilege such conditions as it 'may think proper, and it has annexed a great many 'conditions in this bill."

VI.

The conditions prescribed by the act of Congress have been fully complied with by the Legislature of New York.

The act of Congress (38 Cong. Sess. 1, Ch. 106, sec. 41, page 112) contained the following:

"*Provided*, that nothing in this act shall be construed to 'prevent all the shares in any of the said associations, held by 'any person or body corporate, from being included in the

'valuation of the personal property of such person or corpora-
'tion in the assessment of taxes, imposed by or under State
'authority, at the place where such bank is located, and not
'elsewhere, but not at a greater rate than is assessed upon
'other moneyed capital in the hands of individual citizens of
'such State. *Provided further*, that the tax so imposed under
'the laws of any State upon the shares of any of the associa-
'tions authorized by this act, shall not exceed the rate imposed
'upon the shares in any of the banks organized under authority
'of the State where such association is located."

The act of the State Legislature of April 23, 1866 (2 Sess. Laws, 1866, page 1647), is as follows:

"Section 1. No tax shall hereafter be assessed upon the
'capital of any bank or banking association organized under
'the authority of this State or of the United States; but the
'stockholders of such banks and banking associations shall be
'assessed and taxed on the value of their shares of stock there-
'in: said shares shall be included in the valuation of the
'personal property of such stockholder in the assessment of
'taxes at the place, town or ward, where such bank or bank-
'ing association is located, and not elsewhere, whether the
'said stockholder reside in said place, town or ward, or not;
'but not at a greater rate than is assessed upon other moneyed
'capital in the hands of individuals of this State."

(1). The objection made to the enabling act of 1865, that, under it, the tax on *the shares* of banks formed under the act of Congress exceeded the rate imposed on *the shares* of State Banks, is entirely removed, and now a like tax is imposed on both.

State Banks are no longer taxed on their capital, but the tax is now imposed on the shares of stock, and in every respect, the system of taxation in the State has been changed so as to conform to that prescribed by Congress.

(2). The only other requirement of the act of Congress was that the taxes on the shares of the National Banks shall not be "at a greater rate than is assessed 'upon other moneyed capital in the hands of individual 'citizens of such State."

This, too, has been complied with. The statute of the State expressly forbids a higher rate of taxation.

(3). The meaning of this last proviso cannot be doubted. It refers not to corporations of any kind but to private individuals — citizens of the State. The tax on bank shares is not to exceed the rate assessed upon other moneyed capital in the hands of such persons.

(4). We respectfully submit that the words "moneyed capital" refer only to such moneyed capital as is liable to assessment. They do not refer to U. S. bonds owned by individuals, for they are not moneyed capital liable to assessment. No assessment at all is to be made on such property.

The moneyed capital in the hands of an individual liable to assessment is first to be ascertained. The U. S. bonds, if he has any, are to be deducted. The balance is his moneyed capital liable to be assessed, and the assessment is made on it at precisely the same rate as that upon the shares of stock in a bank.

Congress did not say and did not mean all the moneyed capital in the hands of individual citizens, but only that which "is assessed" or, in equivalent words, is liable to assessment.

(5). No other construction could have been intended by Congress — for that body well knew that U. S. bonds held by individuals were not liable to be assessed by State authority — and that this State had not the power to pass an act which should subject them to State taxation. They will not be supposed to have prescribed an impossibility, or the enacting of an unconstitutional statute as a condition on which alone a State could have the benefit of the privilege tendered by this act of Congress of taxing the shares of National Banks.

(6). We claim that, in this proviso, "rate" means the rate per cent. If the assessment on moneyed capital in the hands of individuals is at the rate of two per cent, the assessment on the shares of stock cannot be at a greater rate.

Nor was any different meaning given to this word, by this court in the case of Van Allen vs. The assessors where it occurs in the other proviso. The act of Congress had required that the tax on *the shares* of National Banks should not exceed the rate imposed upon *the shares* in State Banks. No tax has been imposed by the State upon *the shares* of State Banks. They were left, as before, to be assessed on their capital and this operated unequally as where assessments were made upon *capital*, certain deductions could be made which could not be made when assessed upon *shares*. The tax therefore on *the shares* of National Banks was at a rate exceeding the tax on *the shares* of State Banks by the whole amount of the tax. If the rate of taxation was two per cent, that was the excess of rate over the rate on shares of State Banks not taxed at all.

(7). It is objected that Insurance Companies are taxed on their capital and that the U. S. bonds held by them if any, are exempt from taxation. But Congress has made no requirement as to such corporations. They are neither "Banking Associations," nor "individual citizens."

It was the policy of Congress to place the National Banks upon an equal footing with the State Banks with which they were to come in competition. It allowed the National Banks to be taxed on "all their shares," but required that the tax should not exceed the rate imposed on the shares of State Banks.

The National Banks were not to be placed in com-

petition with Insurance Companies and needed no special protection as to them.

To protect them, however, against a possible abuse — a legislation which might discriminate unjustly, by authorizing a greater rate per cent to be assessed on Bank shares than on the taxable property of individual citizens, the proviso last discussed was adopted.

We suppose that the only safeguards attempted to be secured by Congress at all necessary to the protection of the National Banks were the two following.

1st. Fairness of competition with State Banks.

2d. No discriminating abuse of the taxing power on the rate per cent, as compared with taxable individual capital.

(8). There was no necessity, therefore, for any provision in the act of Congress, as to Insurance Companies. Nor is any amendment called for. Insurance Companies stand already upon the same footing as "individual citizens." Their taxable capital is taxed at the same rate as the shares of banks. And so it should be. It was the intention of Congress, as was said in Van Allen vs. the Assessors, to subject "all the shares" of banks to taxation, without deduction for any U. S. bonds they might hold, because they had availed themselves of the privilege given by that act to use the bonds in a way to secure large profits, but by a use neither contemplated nor permitted at the time of the original contract between the government and the bond holder.

But Insurance Companies had no such privilege and could make no such use of the bonds. They could only hold them as "individual citizens" did, making

no more on them than was agreed upon when the bonds were issued, viz: simple interest.

There was good reason, therefore, for making no provision to subject Insurance Companies to greater taxation than was imposed upon individual citizens.

VII.

In two of the cases now before this court, the question is raised whether a municipal tax may be collected from the shareholders of State Banks, when the capital of the State Bank, or a part of it, is invested in government bonds.

(1). This tax is levied in accordance with the express provision of the State act of April 23, 1866.

(2). It is not a tax on the capital of the banks, nor on the U. S. bonds held by the bank. This question is discussed under the above Third point, and the view there taken was sustained by this court in Van Allen vs. the assessors.

(3). This taxation is by implication authorized by the act of Congress, which expressly permits shares of stock in National Banks, under like circumstances to be taxed, and then requires that the taxation of shares of both National and State Banks shall be placed on the same footing.

(4). And the same reason for it exists as in the case of National Banks, because the bonds are in fact put

to a use not contemplated in the original contract between the government and the lender, of which use the shareholder receives the benefit in the way of dividends.

VIII.

Nor is it any objection to taxing the shares in the place where the bank is located, that some of the shareholders are non residents.

Personal property is liable to be taxed at the place where it is used. This must be regarded as well established both by the practice almost universally adopted, and by judicial decisions.

Session Laws of N. Y. of 1855, Ch. 37.
People vs. Commissioners of Taxes, 23 N. Y., Rep. 224.
Parker Mills vs. Commissioners of Taxes, 23 N. Y. Rep., 242.
Catlin vs. Hull, 21 Verm., 152.
Finley vs. City of Philadelphia, 32 Penn., 381.

It was said by Chief Justice Marshall in McCulloch vs. the State of Maryland, 4 Wheaton, 886, that the power of taxation "may be exercised upon every subject brought within its jurisdiction."

We claim also that, in this case, the question of the right to tax the personal property of a non-resident is not as here presented, open to review in this court.

IX.

The question whether the assessments were made in conformity with and within the time prescribed by

the tax laws of the State of New York cannot be reviewed in this court. The proceedings have been held to be regular and legal by the highest tribunal of the State, and no question is involved in that part of the case, which gives to this court jurisdiction to review the decision.

X.

The judgments of the Court of Appeals of the State of New York should be affirmed in each case with costs.

AMASA J. PARKER,
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